Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1548

ANTHONY G. ALATERAS

Petitioner

versus

FLOYD J. HEPTING AND AMERICAN RADIO ASSOCIATION AFL-CIO

Respondent

PETITION FOR A WRIT OF CERTIORARI TO COURT OF APPEAL, FOURTH CIRCUIT STATE OF LOUISIANA

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO.

ANTHONY G. ALATERAS
Petitioner

v.

FLOYD J. HEPTING AND AMERICAN
RADIO ASSOCIATION AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO COURT OF APPEAL, FOURTH CIRCUIT, STATE OF LOUISIANA

The petitioner, Anthony G. Alateras, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals, Fourth Circuit, State of Louisiana rendered in these proceedings on January 12, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana, as yet unreported, declining to review, appears in the appendix hereto, *infra*, p. A- 11. The opinion of the Court of Appeal, Fourth Circuit, State of Louisiana is reported at 342 So 2d 247 (La. App. 1977), and appears in the appendix hereto, *infra*, pp. A- 6 - 10 . The judgment of the Civil District Court, for the Parish of Orleans, State of Louisiana, together with the reasons therefore, is unreported, and appears in the appendix hereto, *infra*, pp. A- 1.

JURISDICTION

The refusal of certiorari by the Supreme Court of Louisiana was entered on March 25, 1977. It is final. The federal question raised is indicated at pp. 3 - 5 , *infra*. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Whether the National Labor Relations Act, 29 U.S.C. § 151 et seq. forecloses a worker's tort claims against a union's agent by ousting the state court's jurisdiction over the unions internal affairs?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§158(b) (2)

"It shall be an unfair labor practice for a labor organization or its agents -

* * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated * * * * *".

Louisiana Civil Code of 1870:

Art. 2315

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

* * * * *"

STATEMENT OF THE CASE

Plaintiff, a member of the American Radio Association, sued the union and one of its officials for denial of one of his membership rights in the union. He alleged that he was employed upon a vessel (judicially admitted in defendants' answer); that he was temporarily layed off (also, judicially admitted in defendants' answer); and that he had a right under the union rules to be placed upon the Stand By List, which right was denied him through malice.

The defendants answered that plaintiff, as a member, was bound by the internal union rules, and that the union's reassignment of plaintiff's job to another member was in accordance with the union's internal assignment rules.

Prior to answer, the defendants filed a declinatory exception that the petition stated an unfair labor practice, and hence, the National Labor Relations Board had exclusive jurisdiction.

Plaintiff contends that the trial court took jurisdiction for there was a trial, witnesses were called, they testified, and there was an adjudication of the evidence dismissing his complaint upon grounds other then jurisdiction. The appellate court held that the trial court never passed upon the question of jurisdiction.

On the trial, contrary to the pleadings and over the objection of plaintiff, evidence was admitted to show that plaintiff was not employed on the vessel and that the union's assignment rules were not applicable.

The testimony put on by the defendants, which was adopted by plaintiff as a part of his case, showed that plaintiff lost $11,881.30 by being denied his membership right under the union's assignment rules, as loss of wages had his job not been reassigned.

The trial court held that plaintiff failed to carry the burden of proving that defendants had interferred with his employment for while he was entitled to continue his employment, under the union's assignment rules, he was not employed in the first place because he did not get the employment pursuant to the union's internal Constitution and By-Laws. That plaintiff's action in obtaining the employment made the union's assignment rules inapplicable.

On the sole ground that he had the right to rely upon the pleadings and had made timely objection to the introduction of evidence denying his employment and denying the applicability of the union's assignment rules, plaintiff appealed. The Court of Appeals, Fourth Circuit, never reached the question raised on plaintiff's appeal. It held that it had no jurisdiction over the subject matter, annulled the trial court's judgment, and maintained the defendants' jurisdictional exception.

REASON FOR GRANTING THE WRIT

1. The Decision Below Is Not In Accord With Applicable Decisions Of This Court, As They Do Not Oust State Court Jurisdiction Over Peripheral Matters

The petition in this case alleges a tort under LSA-CC Art. 2315 for malicious interference with petitioner's employment by the union's agent.

When a court holds that a grievance is arguably within the jurisdiction of the NLRB, it sends the individual employee to Washington, D.C., imposing a great hardship on him, especially where he is a lone individual not financed out of a lush treasury. For torts, this Court has held that the employee should be allowed to litigate in his home town tribunal and not require him to resort to an elusive remedy in distant and remote Washington, D.C., which takes money to reach. *Inter'l Ass'n of Machinists v. Gonzales*, 78 S. Ct. 923 (1958).

Under the Act, an employee has six months within which to file an unfair labor practice charge with the Regional Director and serve it upon the other party. If he does not file within six months, the claim is barred. 29 U.S.C. §160 (b).

The Regional Director has the power to hold that there has been no violation of the NLRA or that the evidence is insufficient to substantiate the charge. In which event, he tells the employee to withdraw the charge. 29 CFR§ 101.5. If the employee does not withdraw the charge, the Regional Director dismisses it. 29 CFR §101.6. Following dismissal, the employee has 10 days to appeal the decision to the Gen-

eral Counsel *id*. If the General Counsel refuses to issue an unfair labor practice complaint, the decision is apparently unreviewable. *General Driver, Etc. v. NLRB*, 179 F.2d 492 (10th Cir 1950)

There is not a trace of equity in this long-drawn remedy. If the employee gets the resources to exhaust the administrative remedy, he too is exhausted, and if the General Counsel refuses to act, then the employee is without remedy.

Fortunately, the sway of this Court's decisions is that a union agent's delicts upon an employee are merely peripheral and are not arguably within the jurisdiction of the NLRB. *International Union, Etc. v. Russell*, 78 S.Ct. 932 (1958), malicious interference with employment; *Linn v. United Plant Guard Wkrs. of Am.*, 86 S.Ct. 657 (1966), defamation.

If the malicious interference with employment centers itself on the relationship between the individual plaintiff and the union (i.e., membership rights) it is peripheral and the NLRB has no power to act. If the action is concerned with a member's employment rights it is arguably within the Act and state courts are preempted by the Board.

None of the cases relied upon by the court below are concerned with torts committed upon the employee. *Garner v. Teamsters*, 74 S.Ct. 161 (1953) was an action by trucker against union to enjoin picketing. *San Diego Bldg. Trades Council v. Garmon*, 79 S.Ct. 773 (1959) was an employer action against unions for injunction to restrain picketing. Plaintiff has no quarrel with these cases.

If a member is wrongfully expelled from the union and is seeking reinstatement because he can not get work in absence of membership *Amalgamated Asso. of S.E.R. & M.C. E. v. Lockridge*, 91 S.Ct. 1909 (1971) and not because of injury to his rights as a union member; the conduct of the union is arguably within the act and state courts are preempted. But *Lockridge* reaffirms this Court's holding in *Int'l Ass'n of Machinists v. Gonzales*, 78 S.Ct. 923 (1958).

The *Gonzales* decision turned on this Court's conclusion that the law suit was focused on internal union matters, i.e., on the relationship between the individual plaintiff and the union. This Court recognized that the Board had no power over internal union affairs, lacked power to have Gonzales restored his membership, and that state courts had power "to fill out this remedy" (*id* 925) by an award of consequential damages (wage loss, mental suffering). The Taft-Hartley Act, this Court stated, did not require mutilation of "the comprehensive relief of equity" (*id*).

On the other hand, if the member's employment rights rather then his membership rights are in dispute the union's conduct is arguably within. The plaintiff in *United Asso. of Jour. & App. v. Borden*, 83 S.Ct. 1423 (1963) went to Texas from Louisiana looking for work, but was unable to get a union referral from its Texas business agent and he did not get the job; a fact not present in the case at bar. As in *Borden*, the member in *Local 207, Bridge Workers v. Perko*, 83 S. Ct. 1429 (1963) was not attempting to secure any redress for loss of membership rights.

In the instant case, plaintiff alleged that he had a job, was temporarily layed off; that he had a right to be placed upon the Stand By List under the union assignment rules, and

that this right was denied. Even the defendants pleaded that the internal assignment rules were applicable to the case. The right maliciously denied petitioner, being internal, is one that only the state courts have power to remedy.

It is quite true that the collateral effect of the denial of the membership right resulted in plaintiff's loss of employment, but this does not oust a state court's jurisdiction over a union's tortious internal affairs for they are "not in themselves a matter within the Board's competence". *Gonzales, supra.* at 925.

The trial court correctly held that it had jurisdiction to consider the question of plaintiff's membership right to be placed upon the union's Stand By List.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal, Fourth Circuit, State of Louisiana.

Respectfully submitted,

E. HOWARD MCCALEB, III
536 First N.B.C. Building
New Orleans, Louisiana 70112
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 1977, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to C. Paul Barker, Esq., 837 Gravier Street, New Orleans, Louisiana, Counsel for the Respondents. I further certify that all parties required to be served have been served.

E. Howard McCaleb, III
536 First N.B.C. Building
New Orleans, Louisiana 70112
Counsel for Petitioner

APPENDIX A

JUDGMENT

STATE OF LOUISIANA
CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

NO. 538,032 DIVISION "J" DOCKET 4

ANTHONY G. ALATERAS
VS.
FLOYD J. K. HEPTING AND AMERICAN RADIO ASSOCIATION AFL-CIO

JUDGMENT

This cause having been heretofore heard and submitted to the Court for adjudication and the Court considering the law and the evidence and for the written reasons herein filed and made part of the record;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the defendant, Floyd J. K. Hepting and American Radio Association AFL-Cio, and against the plaintiff, Anthony G. Alateras, dismissing the said plaintiff's suit at his costs.

JUDGMENT READ, RENDERED AND SIGNED IN OPEN COURT JUNE 30th 1975

S/ George C. Connolly, Jr.
JUDGE

APPENDIX B

REASONS FOR JUDGMENT

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 538-032 DIVISION "J" DOCKET NO. 4

ANTHONY G. ALATERAS
VS.
FLOYD J. K. HEPTING AND AMERICAN RADIO ASSOCIATION AFL-CIO

FILED: Dy. Clerk

REASONS FOR JUDGMENT

Mr. Anthony G. Alateras, plaintiff, and a member in good standing of the American Radio Association AFL-CIO, received on February 12, 1972 an official permanent assignment as a radio officer to the S/S JAPAN BEAR.

The plaintiff received this assignment by virtue of being on top of the Standby List. He reported to work on February 12, 1972. He continued to work until February 14, 1972 when it is alleged that he was temporarily laid off from his employment. Thereafter, he was denied Stand-By status by Mr. Floyd J.K. Hepting, Port Agent for defendant Union.

Plaintiff alleged that Hepting's refusal to place him upon the Stand-By List removed him from his official work as-

signment and placed him at the bottom of the assignment list.

This action, it is alleged, was arbitrary, irrelevant and discriminatory and constituted interference with his employment. He prays for judgment accordingly.

Floyd J. K. Hepting and the American Radio Association AFL-CIO denied the allegations and alleged inter-alia that plaintiff's removal from the S/S JAPAN BEAR or temporary layoff by the company and the refusal of defendants to reassign plaintiff was in accordance with the National Assignment Rules binding on plaintiff and pursuant to the Constitution and By-Laws of the defendant Union.

After reviewing the pleadings, testimony, the law and the evidence, the court is of the opinion and the evidence preponderates in favor of the defendant's position, since the evidence fails to sustain plaintiff's allegations that the Union and its port agent refused to refer him for employment or interfered with his employment.

The American Radio Association AFL-CIO National Assignment Rule 9(a) recites as follows:

> "The Union Employment Office shall maintain a list of Radio Officers who have temporarily left their assignment for reasons of sickness, vacation, layoff or for other valid reasons. This list shall be known as the Standby List."

Admittedly, plaintiff was issued an official permanent assignment on S/S JAPAN BEAR. The record will reflect

that he was laid off on February 14, 1972. Pursuant to Rule 9(a) of the National Assignment, he was entitled to be placed on STANDBY.

The record will reflect, however, that the plaintiff procured his assignment under a condition which did not comply with the Constitution and By-Laws of the defendant Union or within the meaning and intent of the aforesaid rule.

At the time of plaintiff's assignment, the construction of the S/S JAPAN BEAR had not as yet been completed. The vessel was owned by the shipyard and had not been delivered to the Pacific Far East Steamship Company, its new owner.

Prior to completion of the vessel, a radio officer was requested. The plaintiff recived the assignment. The company hired the plaintiff to perform tests on radio equipment. He was thereafter to be laid off during the sea trial or until delivery. The plaintiff knew of these arrangements before he took the assignment and consented thereto. The assignment, purportedly permanent in nature, was in truth and in fact a temporary assignment and not made pursuant to the Constitution and By-Laws of the defendant Union.

Plaintiff's action and employment constituted, in the Court's opinion, a circumvention of the Union's Constitution and By-Laws, and made inapplicable the provisions of Rule 9(a) of the National Assignment as it pertains to plaintiff's request to be placed on the STANDBY LIST.

Judgment has been rendered accordingly.

s/ George C. Connolly, Jr.
JUDGE

New Orleans, La.
June 30th, 1975

APPENDIX C

JUDGMENT ANNULLED - EXCEPTION MAINTAINED

ANTHONY G. ALATERAS No. 7780

V. COURT OF APPEAL

FLOYD J. K. HEPTING AND FOURTH CIRCUIT
AMERICAN RADIO ASSOCIATION
AFL-CIO STATE OF LOUISIANA

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, DIVISION "J", No. 538-032, HONORABLE GEORGE C. CONNOLLY, JR., JUDGE

: : :

EDWARD J. STOULIG
JUDGE

JAN 12 1977

(Court composed of Judges William V. Redmann, Edward J. Stoulig and Ernest N. Morial)

E. HOWARD McCALEB, III
for plaintiff-appellant.

DODD, BARKER, BOUDREAUX, LAMY & GARDNER
C. PAUL BARKER
for defendants-appellees

JUDGMENT ANNULLED; EXCEPTION MAINTAINED.

APPENDIX D

OPINION OF COURT OF APPEAL

Plaintiff, Anthony G. Alateras, instituted this suit for $750,000 damages and lost wages allegedly resulting from an unfair and discriminatory labor practice by defendant, Floyd J. K. Hepting, a New Orleans based official of defendant, the American Radio Association AFL-CIO, in refusing to place plaintiff's name on a "standby" list for employment aboard ship as a radio officer.

Defendants filed a declinatory exception to the court's jurisdiction, asserting that a complaint stemming from an alleged unfair labor practice is within the exclusive jurisdiction of the National Labor Relations Board under 29 U.S.C. § 151 et seq. By stipulation the exception was referred to the merits but was never passed upon by the trial court. After a trial on the merits, plaintiff's suit was dismissed. He has appealed.

[1] Although defendant has neither appealed nor answered the appeal, we notice sua sponte our lack of jurisdiction because it is inappropriate for any court to adjudicate merits if the subject matter may not properly be brought before it.

[2] Alateras alleges Hepting, a union representative, refused to place plaintiff's name on a stand-by list for future employment as the union rules require. The gravamen of his complaint is that defendant violated 29 U.S.C. § 158(b)(2), which states:

"It shall be an unfair labor practice for a labor organization or its agents –

* * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *".

29 U.S.C. § 160 provides for administrative and judicial review of any complaint based on an alleged violation of § 158 before the National Labor Relations Board. As this section has been interpreted by the United States Supreme Court, the Board's jurisdiction in the unfair labor practice area is exclusive.

The concept of federal preemption in labor relations has its genesis in the interstate commerce and federal supremacy clauses of the United States Constitution. (Art. I, § 8 and Art. VI.) In *Amalgamated Ass'n of St., E.R. & M. C. Emp. v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed. 2d 473 (1971), the Supreme Court discussed the need for uniformity in adjudicating labor disputes and the areas where federal preemption would be necessary to achieve this result. After relating the trial and error approaches taken by the federal judiciary to delineate between federal and state jurisdiction in labor matters, the court cited with approval this first workable formulation that emerged in *San Diego Building Trades Council, Etc. v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 779, 3 L.Ed. 2d 775 (1959), viz:

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.

"At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board. See, e.g., *Garner v. Teamsters, etc. Union*, 346 U.S. 485, especially at pages 489-491, 74 S.Ct. 161, at pages 165-166, 98 L.Ed. 228; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546."

In *Local 100 of United Ass'n of Jour. & App. v. Borden*, 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed. 2d 638 (1963) --

factually analogous to this case -- the Court followed Garmon and held the state court did not have jurisdiction.[1]

In *Local No. 207, Int. Ass'n of Bridge, Etc. v. Perko*, 373 U.S. 701, 83 S.Ct. 1429, 10 L.Ed. 2d 646 (1963), the Supreme Court held that state jurisdiction was preempted even where the object of the suit was damages allegedly incurred as the result of an unfair labor practice.

In the instant case plaintiff first filed a complaint with the National Labor Relations Board based on the same incident upon which he premises this suit. This action was filed while the charges were pending before the administrative review agency. Ultimately his Board complaint was dismissed as meritless and appealed unsuccessfully through several administrative levels. In this case Alateras' complaint was investigated and the National Labor Relations Board found the evidence insufficient to warrant further proceedings. But even if no complaint had been filed with the Board, under the jurisprudence summarized the state court has no jurisdiction to entertain this suit and the declinatory exception should have been maintained.

For the reasons assigned, the judgment appealed from is annulled and it is now ordered that this suit be dismissed for lack of jurisdiction. Appellant is to pay all costs.

JUDGMENT ANNULLED; EXCEPTION MAINTAINED

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1. H.N. Borden, as a member of a plumbers' union, complained a union official arbitrari', withheld a referral he needed before he could be hired on a bank co struction job.

APPENDIX E

ORDER REFUSING WRIT

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

ANTHONY G. ALATERAS March 25, 1977

V.

FLOYD J. HEPTING AND AMERICAN
RADIO ASSOCIATION AFL-CIO NO. 59,429

. . . . . .

In re: Anthony G. Alateras applying for certiorari, or writ of review, to the Court of Appeal, Fourth Circuit Parish of Orleans

. . . . . .

Writ refused. There is no error of law in the judgment of the court of appeal.

S/ JWS
S/ FWS
S/ AT JR
S/ JAD
S/ WFM

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
March 25, 1977

/s/ Phil Trice
Deputy Clerk